BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,

v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR CITY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus curiae, the City of Los Angeles, owns and, through its Department of Airports, operates Los Angeles International Airport ("LAX") and three smaller airports in the Los Angeles area. LAX is one of the largest international airports in the United States. On an average day, 130,000 passengers and 3.8 million pounds of freight and mail pass through the airport on 1,700 flights. LAX serves the residents of the Los Angeles area and millions of visitors drawn to the region's business, commercial and

tourist enterprises and activities. Visitors arriving at LAX spend approximately $17.7 million per day in the region. LAX also is a large hub airport, serving travelers *en route* to and from national and international destinations. It is a major gateway to the Pacific, Asia, and Australia, as well as to Europe, Canada, Mexico and Latin America.

LAX creates $3.3 billion in aviation activity at or near the airport, and almost three times this sum in air freight and visitor expenditures in the region. Approximately 50,000 jobs are directly attributable to LAX.

LAX recently adopted a "compensatory" methodology to calculate airline landing fees. This methodology charges to airline tenants only those costs attributable to their use of airport services and facilities. It does not subsidize airline costs with revenues from concessionaires and other airport tenants, but it does allow an airport to use non-airline revenues to fund capital projects. In this and other cases, now including LAX, the airlines are challenging the right of an airport to use a compensatory methodology to determine landing fees charged to the airlines.[1]

Revenues from concession and other non-airline tenants are critical to allow LAX to become self-sustaining, which, contrary to the airlines' assertion in this case, does not simply mean that an airport's current operating revenues must equal its current operating costs. Airports have massive capital needs, and if airports are unable to fund necessary expansion and improvement projects, they cannot be self-sustaining.

[1] In a lawsuit filed recently in the United States District Court for the Central District of California, airlines servicing LAX have sought to invalidate its landing fees, among other grounds, as unreasonable under the Anti-Head Tax Act, 49 U.S.C. app. 1513 ("AHTA"). *Air Transport Ass'n of America v. City of Los Angeles*, No. CV 93-4539-AWT (filed July 30, 1993). As in the case before the Court, the airline plaintiffs in the Los Angeles suit seek a judicial determination requiring that the airport cross-credit in favor of the airlines the concession and other revenues the airport earns from non-airline tenants. The City of Los Angeles has moved to dismiss the complaint on the ground that the AHTA does not create a private right of action.

The City of Los Angeles wants to manage and develop its concessions and other sources of non-airline income efficiently in order to fund the capital projects necessary for LAX to maintain and improve its position as a world-class airport. The City believes that LAX, as a public enterprise, plays an important role in the economic well-being of Los Angeles and the region. Therefore, it is necessary that the City and its citizens have the financial capability to decide the priorities and direction of LAX. The City submits this brief to provide the Court the perspective and experience of one of the nation's largest airports on the issues of airport rate-setting and capital funding.[2] The Court's resolution of the issues in this case likely will have a significant effect on the financial condition of LAX and the nation's other large hub airports.

SUMMARY OF ARGUMENT

The City of Los Angeles urges this Court to affirm the judgment of the U.S. Court of Appeals for the Sixth Circuit, which properly upheld the right of an airport to choose a compensatory methodology for the calculation of rates and charges. As applied by the City of Los Angeles, the compensatory methodology is a reasonable method for calculating charges. The methodology attributes to airlines only the costs of those services the airport provides to the airlines, and results in fee amounts comparable to those assessed by airports across the country. The compensatory methodology also makes available a source of revenue critical to an airport's ability to be less dependent upon federal assistance and debt, and thus, more self-sustaining.

[2] The City of Los Angeles is a political subdivision of a State and is therefore permitted to file, through its authorized law officer, an *amicus curiae* brief without the consent of the parties. Sup.Ct.R. 37.5.

No federal statute, regulation or policy, and certainly nothing in the Anti-Head Tax Act, prohibits the use of a compensatory methodology by an airport proprietor. To the contrary, the courts and the Department of Transportation have given broad discretion to airport proprietors in their selection of a rate methodology and fee structure. In no sense can concession revenues be found to constitute a tax on air passengers since no airport user is required to use the concessions or services offered. Moreover, the airlines' contention that they are the true source of airport concession revenue is demonstrably false and, even if true, provides no legal basis for requiring that only a residual methodology be used in calculating airport fees and charges, or that concessionaires share in the costs of air-side operations under a compensatory methodology.

ARGUMENT

I. THE COMPENSATORY METHODOLOGY FOR DETERMINING LANDING FEES IS NOT ONLY REASONABLE BUT SERVES THE GOALS OF AIRPORT DEVELOPMENT.

A. The Compensatory Methodology Charges Airlines The Costs Of Services The Airport Provides To The Airlines.

Respondents and LAX use a "compensatory" or cost-of-services methodology to calculate landing fees charged to the airlines that use airport facilities and services. A compensatory methodology is similarly used to determine landing fees at many of the nation's other major airports, including those in Boston, Denver, St. Louis, Phoenix and New York.

The compensatory methodology is premised on a theory of cost recovery. It separately charges costs to, and accounts for revenues received from, the airport's various classes of tenants. Accordingly, the rates charged to airline tenants reflect all the costs associated with the airlines' use of airport facilities and services, without crediting to those airlines revenues derived from other non-airline tenants, such as concessionaires. The airport proprietor is free to generate, retain, and use profits or surpluses from non-airline tenants to fund airport capital projects. As a result, the airport has an incentive to manage and develop its non-airline sources of revenue productively.

In contrast, a "residual" methodology provides for the calculation of airline charges by first determining total airport revenues (excluding landing fees from airlines), and then subtracting total airport expenses. Landing fees are then calculated to cover the amount by which total expenses exceed total revenues. In addition, airlines typically permit airports to apply an amount towards the airport's capital fund, regardless of whether these funds are earmarked for current or future capital projects. As a result, airlines exercise control over the amount of total revenues allocated to the airport's capital fund. Airlines generally prefer a residual methodology because it subsidizes airline costs with revenues received from non-airline tenants and gives airlines a degree of control over airport expenditures.

B. The Compensatory Methodology Is Inherently Reasonable.

The compensatory methodology is inherently reasonable because it charges airlines only those costs properly attributed to the airlines. Charges assessed to the airlines are not based on the airport's future capital needs, but on the current costs of only those facilities and services used by the airlines. For these reasons, virtually all courts that have considered the compensatory methodology as a basis for determining landing fees have concluded that the methodology is reasonable.[3]

---

[3] *See Northwest Airlines, Inc., v. County of Kent, Michigan*, 955 F.2d 1054, 1061 (6th Cir. 1992) (fees are reasonable if based on a fair

This Court has also held that "it is the *amount* of the tax not its formula, that is of central concern." *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716 (1972) (emphasis added); *see also Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("it is the result reached not the method employed which is controlling."). The application of the compensatory methodology by the City of Los Angeles at LAX has resulted in landing fees that, even after recent increases, are reasonable in amount, and are less than or comparable to those charged by many other airports using residual or hybrid methodologies.

Respondents, using a compensatory methodology, charge a landing fee of $0.70 per 1000 pounds of landed weight at Grand Rapids. At LAX, also using a compensatory methodology, the City of Los Angeles currently charges a landing fee of $1.56 per 1000 pounds of landed weight for signatories to operating permits. The following table shows 1991-92 landing fees of various major hub airports in the U.S.:

approximation of cost of providing facilities) (citing *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 712-14 (1972)), *cert. granted*, 113 S. Ct. 2926 (1993); *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. 1112, 1120 (W.D. Mich. 1990) (rates and charges based on airlines share of operating expenses found reasonable), *aff'd in part and rev'd in part*, 955 F.2d 1054 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2926 (1993); *City and County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834, 839 (D. Colo. 1989) (rejecting argument that exclusion of concession revenues in consideration of landing fees is unreasonable); *Raleigh-Durham Airport Authority v. Delta Air Lines, Inc.*, 429 F. Supp. 1069, 1079 (D. N.C. 1976) (multiple cash register method is "useful and reasonable tool whose proper application can produce a useful and reasonable result.") *But see Indianapolis Airport Auth. v. American Airlines*, 733 F.2d 1262 (7th Cir. 1984).

AIRPORT	TOTAL PASSENGERS	METHODOLOGY	LANDING FEES (Per 1,000 lbs.) (Signatory)	(Non-Signatory)
Boston Logan Int'l	21,451,858	Compensatory		1.69
Dallas Ft. Worth	48,198,208	Residual	1.75	2.00
Detroit Wayne Cty.	20,704,555	Residual	1.80	2.70
Houston Intercont'l	18,117,113	Hybrid	1.54	1.54
Kennedy Int'l	26,300,000	Compensatory	2.21	2.21
La Guardia	19,700,000	Compensatory	3.27	3.27
Lambert-St. Louis	19,151,278	Compensatory	1.20	1.50
Newark Int'l	22,300,000	Compensatory	2.27	2.27
O'Hare Int'l	59,787,000	Residual	1.89	2.36

AIRPORT	TOTAL PASSENGERS	METHODOLOGY	LANDING FEES (Per 1,000 lbs.) (Signatory)	(Non-Signatory)
Philadelphia Int'l	15,041,935	Other	1.37	1.49
Phoenix Sky Harbor	22,140,437	Compensatory	0.93	0.93
Seattle-Tacoma Int'l	16,313,289	Residual	1.98	1.98
Washington Dulles	10,970,899	Hybrid	2.16	2.70

Source: American Ass'n of Airport Executives, 1991-92 Rates and Charges Survey.[4]

[4] This survey also shows that Respondents' landing fees are less than or comparable to those charged at many small hub airports, including Baton Rouge Metro. ($1.45); Birmingham ($1.06); Albany County ($0.79); Cedar Rapids Mun. ($0.93); Dayton Int'l ($1.28); Fairbanks Int'l ($0.82); and Harrisburg Int'l ($1.10).

The Air Transport Association of America ("ATA"), presents figures and a chart to argue that landing fees are unreasonable because airport costs have risen faster than air fares and other airline operating costs. *See* Brief of Air Transport Association of America as *Amicus Curiae* in Support of Petitioners, at 7-8 ("ATA Brief"). However, the figures and chart are misleading. It is totally inappropriate to compare trends in landing fees with trends in air fares and other airline operating costs because air fares and other airline costs are highly dependent on fuel costs. As the ATA itself notes, fuel prices (which represent a substantial portion of airline costs) declined by 36% during the same period. *Id.* at 7. Air fares have also declined because airlines have engaged in fare wars and have charged air fares substantially below costs, resulting in massive losses for the industry in recent years.

Finally, landing fees constitute only about two percent of total airline operating expenses. *See The Airline Monitor*, Sept. 1993, at F2 (chart showing operating expenses for major airlines in 1992). The ATA's suggestion that increased landing fees are responsible, even in part, for the problems facing the airline industry is without merit.

C. Because It Allows Airports To Fund Capital Improvements With Earnings From Non-Airline Tenants, The Compensatory Methodology Serves Congress' Goal That Airports Become "As Self-Sustaining as Possible."

The compensatory methodology allows airports to use their revenues from non-airline tenants to fund capital improvements. As a result, the compensatory methodology enables airports to reduce their reliance on federal funding—a goal Congress sought to promote when enacting federal funding legislation. The Airport and Airway Improvement Act ("AAIA")[5] specifically requires airport owners or operators receiving federal grants to "maintain

[5] Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248,

a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . . ."[6] Moreover, Congress has recognized that concession revenues are an important source of funding for the capital needs of airports, and that airports that generate substantial concession revenues are more able to be self-sustaining.[7]

Retained earnings from concession revenues permit airports to be less burdened by local debt. Indeed, as the district court below observed, prudent management of surpluses "allows the Airport to run efficiently and with foresight thereby avoiding the necessity of seeking extra tax or bond revenues from the citizens of [the community] for expansion or improvement." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. at 1120. While airlines may have chosen to meet their capital needs by taking on massive debt, airlines have no right to presume that airports should place themselves in a similarly vulnerable financial position.

The ATA's amicus brief states that, for the calendar year 1991, some of the nation's largest airports earned substantial revenues in excess of their operating expenses. *See* ATA Brief, at 9. The ATA asserts that airport revenues in excess of operating costs are "windfalls" that are indicative of "unreasonable landing fees."[8] *See id.* at

tit. V, 96 Stat. 671 (codified, as amended, at 49 U.S.C. app. 2201 *et seq.* (1988)).

[6] 49 U.S.C. app. 2210(a)(9) (1988).

[7] *See* S. Rep. No. 12, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 1434, 1440 (report accompanying Anti-Head Tax Act) (large hub airports are more self-sustaining because landing fees and concession revenues allow them to cover both operational expenses and to underwrite needed capital investment borrowing).

[8] On the basis of a press report, the ATA speculated that the City of Los Angeles seeks to use revenues generated at LAX for the City's general expenses. ATA Brief, at 5 & n.5. However, the ATA in its

8-9. To the contrary, profits from non-airline tenants allow airports to fund at least part of their improvements and expansion without burdening federal, state and local taxpayers, and allow airports to reduce their debt burden. In addition, revenues in excess of expenses provide reserves for emergency repairs and replacements. Finally, if airports are unable to retain and use profits from non-airline tenants, airports will lack incentive to develop new concessions and other non-airline sources of revenue.

The airlines' argument erroneously assumes that new capital improvements and expansion of existing facilities are not needed for operations. The argument ignores the tremendous growth in airport passengers and the necessity to accommodate this growth. It is non-airline profits that allow airports to sustain themselves by becoming increasingly independent of federal funding, local debt and airline control.[9]

suit against the City of Los Angeles failed to allege any claim of diversion. Instead, the ATA was forced to concede that "[d]efendants apparently recognize that they may not divert airport revenues to the City's General Fund unless and until numerous federal laws, grant assurances, and bond covenants are changed." Complaint for Declaratory and Injunctive Relief ¶ 61, *Air Transport Ass'n of America v. City of Los Angeles*, No. CV 93-4539-AWT (filed July 30, 1993).

[9] Petitioners suggest that the Court's determination of whether landing fees are reasonable should be based on an evaluation of the specific airports purposes to which revenues received from non-airline tenants are put. The Petitioners have no basis to question the purposes for which airport owners may choose to apply non-airline revenues.

II. THERE IS NO LEGAL OR POLICY BASIS FOR FINDING THAT AIRLINES MUST RECEIVE THE ECONOMIC BENEFIT OF AN AIRPORT'S CONCESSION REVENUES.

A. The Courts Have Deferred To Rate-Making Bodies On Issues of Rate-Making Methodology.

Historically, federal courts have declined to involve themselves in issues of rate-making methodology. Rate-making, including the cost allocation component of rate-making, "is essentially a legislative function." *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945). This is so because "[a]llocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id., quoted in National Ass'n of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 825 (1983).

Courts considering the AHTA have uniformly observed that Congress did not intend that courts perform a rate-making function by deciding what methodology airports must use in setting landing fees.[10] Accordingly, the Sixth

[10] *See, e.g., Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d at 1066 (Nelson, J. concurring in part and dissenting in part) (In the absence of a statutory cost-allocation formula, the courts have "no warrant to require the use of one acceptable method in preference to another.") (citing *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945)); *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1270 (7th Cir. 1984) ("the powers of a federal court in regulating rates are more limited than those of an administrative agency. We can invalidate an unreasonable rate, but we cannot fix the reasonable rate; that is a legislative or administrative rather than a judicial function.") (citing *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 397-98 (1894)); *City and County of Denver*, 712 F. Supp. at 839 ("Nothing in the history and purpose of [the AHTA] indicates that Congress intended the courts to act as a public utility commission and intervene in the setting of airport rates and charges through the adoption or rejection of any particular type of cost accounting methodology.").

Circuit below properly deferred to airport proprietors "as long as they act within a broad range of reasonableness." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d at 1060 (citing *Evansville*, 405 U.S. at 712-14).

B. The Department Of Transportation Has Accorded Airports Broad Discretion In Rate Setting And Has Construed The AHTA As Only Prohibiting Head Taxes Or Their Equivalents.

As a matter of policy, the Department of Transportation ("DOT") has given airports "wide latitude in selecting a particular rate methodology and fee structure." Brief for the United States as *Amicus Curiae*, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, at 8, *Northwest Airlines, Inc., v. County of Kent, Michigan*, United States Supreme Court No. 92-97. With specific reference to the AHTA, the DOT, in its decision with respect to landing fees at Boston's Logan International Airport, found that:

> Congress, when it passed the Anti-Head Tax Act (49 U.S.C. 1513), sought to prevent the imposition of taxes by local authorities on passengers traveling in air commerce . . . . Both the language and legislative history of the Anti-Head Tax Act indicate that Congress was concerned in that statute only with prohibiting head taxes or their equivalents. *Cf., Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983).

Investigation Into Massport Landing Fees, FAA Docket 13-88-2 (Dec. 22, 1988) (Decision of Deputy Secretary of Transportation), *aff'd, New England Legal Foundation* v. *Massachusetts Port Auth.*, 883 F.2d 157, 170 (1st Cir. 1989).

Similarly, both the DOT and the Federal Aviation Administration have concluded that fees charged car rental companies by an airport are not within the purview of the AHTA, because the statute is

> limited in application to situations involving carriage by aircraft. Since non-aeronautical off-airport service providers are not engaged in carriage by aircraft they are considered outside the protection of [the AHTA] and, consequently, a gross receipts fee imposed upon them by an airport authority is not prohibited.

Letter from FAA Administrator Donald D. Engen to Senator Mark Andrews (Feb. 1, 1985), contained in "A Review of The Imposition of Gross Receipts Fees on Off-Airport Car Rental Companies," U.S. Department of Transportation, Report to the Senate Committee on Appropriations, the Senate Committee on Commerce, Science and Transportation, the House Committee on Appropriations, and the House Committee on Public Works and Transportation, App. B. at 84 (Apr. 1989).

Petitioners are, thus, urging this Court to adopt a construction of the AHTA which is contrary to that given it by the agency charged with its administration. Since the DOT's construction of the AHTA prohibits only "head taxes or their equivalents," and that construction is clearly reasonable, accepted principles of deference to agency interpretation require rejection of Petitioner's contrary construction of the AHTA. *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

C. Concession Revenues Do Not Constitute An Indirect Tax On Air Travelers.

The legislative history of the AHTA also makes clear that, whether direct or indirect, fees do not fall within the prohibitions of the statute unless they qualify as head taxes, calculated as a flat rate, per air passenger. "The head tax imposes a flat rate on passengers, regardless of the distance traveled by the passenger." S. Rep. No. 12, *supra*, 1973 U.S.C.C.A.N. at 1451. By using the phrase "indirect"

taxes, Congress sought only to prohibit both the airport and the airlines from collecting a per passenger charge.

> Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel . . . .
>
> If the passenger *must pay* a local head tax, it adds directly to the cost of his trip. And if head taxes are absorbed by the carriers, where law permits, because of the cost and difficulty of collection, or even refusal of passengers to pay, it still will lead to increased air travel costs . . . . In the end, a fare increase would have to be implemented. Thus, the air passenger loses either way on state and local head taxes.

Id. at 1451 (emphasis added).

As was the case with the courts below, courts addressing this issue have concluded that non-airline revenues are not within the scope of the AHTA.[11]

To interpret "indirect" taxes to include airport concession revenues would require an extension of the AHTA's protections beyond the class of persons the law was designed to protect. It is clear from the legislative history "that in enacting § 1513 Congress was solely concerned with the adverse effects local taxes were having on the public's right to travel . . . ." *Interface Group, Inc. v. Massachusetts Port Auth.*, 631 F. Supp. 483, 494 (D. Mass.

---

[11] *See Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. at 1117, ("nonairlne concession revenues are not within the scope of the AHTA"); *City and County of Denver*, 712 F. Supp. at 836-37 ("Read literally, the Anti-Head Tax Act has no application to . . . concession revenues."); *see also Salem Transp. Co. v. Port Auth.*, 611 F. Supp. 254, 257 (S.D.N.Y. 1985) (phrase "air transportation" does not apply to ground transportation); *State ex rel. Arizona Dep't of Revenue v. Cochise Airlines*, 128 Ariz. 432, 437 (Ariz. Ct. App. 1980) (phrase "air commerce" does not include transportation of freight).

1986), *aff'd in part and vacated in part*, 816 F.2d 9 (1st Cir. 1987). Accordingly, the statute and congressional comments are replete with references to air travelers as the intended beneficiaries of the statute.[12]

Airport concession revenues do not implicate the right to travel. These revenues are not derived solely from air passengers, but also from non-passengers. Both groups use airport concessions as consumers exercising individual choices. Concession users can choose public transit, or taxis, over car rental and parking fees. They can eat, drink and shop before going to, or after leaving, the airport. They may choose to do these at the airport because, as consumers, they are willing to pay a premium for convenience.

The AHTA is not designed to shield consumers from paying the market premium for convenience. As noted by the Colorado district court, and by the lower courts in this case, the airport's decision to operate concessions at a profit is outside the purview of the AHTA because it "is not an exploitation of airline passengers who have the freedom of choice to use the amenities [the airport] has provided." *City and County of Denver*, 712 F. Supp. at 838-39; *accord Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. at 1118; *Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d at 1061.

In contrast, head taxes by their nature are assessed on all captive air travelers, and cannot be avoided.[13]

[12] *See, e.g.*, S. Rep. No. 12, *supra*, 1973 U.S.C.C.A.N. at 1450 ("Congress . . . established a uniform national program of taxation and funding for airport improvements. This Committee never intended that air travelers would be subject to state and local head taxes as well as to national user charges. The Committee believed there was no danger of this because the basic constitutional guarantee of a citizen's right to unhindered interstate travel, and a U.S. Supreme Court decision which had prevailed since 1867, indicated that such taxes could not be constitutionally imposed").

[13] The Seventh Circuit concluded that it should be a matter of indifference to a traveler "whether he pays $100 for the ticket, $10 in head tax and $30 for parking; or $120 for the ticket and $20 for parking, with no head tax. What matters to him is the total cost that he *must* incur to make the flight, rather than the form in which the cost is distributed among the various items he *must* buy." *Indianapolis*, 733 F.2d at 1268 (emphasis added). The Seventh Circuit's reasoning is flawed because it ignores the fact that the traveler does not have to pay the parking charge to take the flight. In Los Angeles, an air traveler who wishes to park at LAX has an even greater choice, because there are numerous private off-site parking facilities that are alternatives to the airport's parking facilities.

D. There Is No Basis For Requiring That Concessionaires Share In The Costs Of Airside Operations.

Petitioners argue that concessionaires should share in the costs of airside operations because, in effect, the airlines create the market of concession customers. Petitioners ignore, however, the fact that concession customers include individuals who are not air travelers. Large airports and airports in urban areas may attract people who live or work in the vicinity of the airport to specialty retail facilities or restaurants and, indeed, airport operators now increasingly provide retail establishments for surrounding residents.

At LAX, the 50,000 people who work at the airport also use its facilities. Business people frequently use its meeting facilities. Additionally, particularly at hub airports, friends, relatives, and acquaintances of travelers often use airport facilities while meeting air passengers.

Nevertheless, even if all concession customers were also passengers, Petitioner's argument proves too much. In effect, the airlines are claiming a right to share in the economic activity of air passengers before and after they travel, simply because airline transportation services deliver customers to the activity. In fact, the airlines also deliver passengers to the city's businesses and tourist attractions. By the airlines' logic, because the proprietors of

the area's tourist attractions and businesses benefit from airside operations, they also should be required to share in the costs of airside operations.

The airlines urge a self-serving notion of market-making and benefit. If an airport were located in the middle of the ocean, few passengers would fly there. It is the municipality that an airport serves, including its business and commercial enterprises, tourist attractions and people, that is responsible for the market of customers for both the airlines and the concessionaires. Indeed, if all economic players were required to share costs based on benefits they confer upon each other, the airlines would have to share in municipal costs because it is the municipality that creates, at least in part, a market for airline passengers.

Even if, however, concessionaires benefit from airside operations in the manner claimed by the airlines, the law does not require airside costs to be allocated to concessionaires. Cases addressing the proper allocation of costs under the AHTA require at most that the amounts charged to the airlines not be excessive in light of the benefits conferred by the airport on the airlines.[14] These decisions do not require an airport to undertake cost allocations which consider those benefits conferred by one airport user on another, or other ethereal "benefits" subjectively determined by the airlines.

[14] *See Evansville*, 405 U.S. at 716-17 (charges may not be "excessive in comparison with governmental benefit conferred."); *accord Northwest Airlines, Inc. v. County of Kent, Michigan*, 955 F.2d at 1061; *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036, 1037-38 (1st Cir. 1977); *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F. Supp. at 1120; *City and County of Denver*, 712 F. Supp. at 839 (rejecting argument that exclusion of concession revenues in consideration of landing fees is unreasonable.).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

JAMES K. HAHN
City Attorney
GARY R. NETZER
Senior Assistant City Attorney
BRETON K. LOBNER
Assistant City Attorney
City of Los Angeles
Department of Airports
#1 World Way
Los Angeles, CA 90009-2216
(310) 646-3260

STEVEN S. ROSENTHAL*
HAROLD J. MCELHINNY
ANTHONY L. PRESS
LORIE M. ALEXANDER
MORRISON & FOERSTER
2000 Pennsylvania Ave., N.W.
Suite 5500
Washington, D.C. 20006-1812
(202) 887-1500

Counsel for the City of Los Angeles as Amicus Curiae

**Counsel of Record*

September 1993